STATE OF MICHIGAN
IN THE SUPREME COURT

KIM SAFFIAN,

Plaintiff/Appellee,

v

Supreme Court No: 129263
Court of Appeals No: 250645
Lower Court No: 01-6896-NH

ROBERT R. SIMMONS, DDS,

Defendant/Appellant.

PATRICK & KWIATKOWSKI, PLLC
By: Aaron J. Gauthier (P60364)
Attorneys for Plaintiff/Appellee
520 N. Main Street, Suite 302
Cheboygan, MI 49721
(231) 627-7151

BENSINGER COTANT & MENKES, PC
By: Scott R. Eckhold (P29635)
Attorneys for Defendant/Apppellant
308 West Main, P.O. Box 1000
Gaylord, MI 49734
(989) 732-7536

129263

PLAINTIFF/APPELLEE'S

BRIEF IN OPPOSITION TO APPLICATON FOR LEAVE TO APPEAL

TABLE OF CONTENTS

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

INDEX OF AUTHORITIES

Case Law **Page #**

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

Statutes and Court Rules:

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

COUNTERSTATEMENT OF ORDER APPEALED FROM

Defendant seeks leave to appeal from the July 7, 2005 opinion of the Court of Appeals, in which the Court affirmed the trial court's reinstatement of a default against Defendant for failure to file a timely responsive pleading to Plaintiff's complaint.

This case is about a default for failing to file a timely responsive pleading. Defendant was personally served with a complaint and an affidavit of merit, triggering his duty to respond timely. He did not do so, and a default was entered.

Defendant moved to set aside the default, arguing that his failure to respond was excused because his office manager had faxed the complaint to his malpractice insurer, and he assumed that the insurer would handle the matter. Defendant did not argue that he had no duty to respond, but he instead sought to excuse his failure to meet that duty. The trial court—incorrectly—set aside the default on that basis.

Discovery revealed that no fax transmittal occurred. Because the basis for setting aside the default was found to be not valid, the trial court properly reinstated that default.

At this point, Defendant argued that he had no duty to respond to the complaint, because the accompanying affidavit of merit was later found to be technically deficient since it was signed by a specialist when Defendant was a general practitioner. But Defendant had waived this argument by never questioning his duty to respond when initially seeking to set aside the default, but only attempting to excuse his failure to meet that duty. Also, under the applicable court rule, Defendant's duty to respond was

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

triggered when he was served with the complaint and affidavit of merit.

This case is a default case, and the trial court did not abuse its discretion by reinstating the default. The Court of Appeals affirmed, ruling that a medical-malpractice defendant has a duty to file a responsive pleading when served with a complaint and affidavit of merit. Even the dissenting judge agreed with this legal proposition, stating that a defendant may not unilaterally determine whether an answer is required when served with a complaint and affidavit of merit, even where that affidavit is later determined to be defective.

The Court of Appeals ruling was legally correct, and this Court should deny Defendant's application for leave to appeal. Defendant has not established grounds for this Court to review this case under MCR 7.302(B).

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

COUNTERSTATEMENT OF QUESTION PRESENTED

Defendant was personally served with a complaint and affidavit of merit, but failed to file a timely responsive pleading and was defaulted. In a motion to set aside the default, Defendant asserted that his office manager faxed the complaint to his insurer, but that the fax was not received. The trial court set aside the default, ruling that this constituted a reasonable excuse for failing to respond timely. However, discovery revealed that there had been no fax transmittal at all, so the trial court reinstated the default. Did the trial court abuse its discretion by reinstating the default?

The Court of Appeals answered, "No."
Plaintiff/Appellee answers, "No."
Defendant/Appellant answers, "Yes."

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

COUNTERSTATEMENT OF MATERIAL FACTS AND PROCEEDINGS[1]

On April 14, 1999, Plaintiff was treated by Defendant Robert R. Simmons, a licensed dentist. Plaintiff alleges that Defendant negligently perforated her maxillary sinus and that he negligently failed to treat that perforation properly, resulting in serious injuries.[2] After serving Defendant with a notice of intent to file a claim and waiting the statutory notice period, Plaintiff filed a summons and complaint, which were properly served on Defendant.[3] An affidavit of merit executed by Dr. Mark Nearing, DDS, accompanied the complaint.[4] That affidavit specified how Defendant breached the applicable standard of care.[5]

Defendant failed to file any responsive pleading within the 21 days provided by law. Therefore, a default was entered against Defendant on October 4, 2001.[6]

Nearly two months later, Defendant's attorney filed an appearance.[7] Defendant then moved to set aside the properly entered default, arguing that good cause existed to set it aside because he had faxed the complaint to his insurer, but that transmission

---

[1] For ease of reference, the transcripts will be referred to as follows:
Tr I = Motion, 12/17/01
Tr II = Motion, 5/6/02
Tr III = Motion, 7/8/02
Tr IV = Plaintiff's motion to reconsider ruling setting aside previously entered default, 8/28/02
Tr V = Jury selection, 7/15/03.

[2] See Complaint, 8/28/01.

[3] Summons and Complaint, 8/28/01; Return of service, 9/13/01.

[4] Affidavit of Merit, dated 7/10/01, attached to Complaint, 8/28/01.

[5] *Id.*

[6] Default application, entry, and affidavit, 10/4/01.

[7] Appearance, 12/3/01.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

was never received.[8] In support of his motion, Defendant submitted the affidavit of Mona Wilson, one of his employees, who stated, "I personally faxed to ProNational Insurance Company to their office in Okemos, Michigan the Summons & Complaint on September 19, 2001, which would be twelve (12) days following the date that Dr. Simmons was personally served."[9] Ms. Wilson also indicated that the fax machine only prints a "verification" form if there is some communication problem, and that the machine did not print any form indicating such a problem.[10] Ms. Wilson believed that Defendant's malpractice insurer would "take care of the matter from that point on."[11] Therefore, she did not follow up with the insurer on the matter.

However, according to an affidavit submitted by Rosalee Barnes, the senior claims assistant with Defendant's insurer assigned to handle the claim against Defendant, there was no record that the fax was ever received by the insurer.[12] Rather, the insurer became aware of the filing of the complaint only after being notified by Defendant's employee that a default had been entered.[13] Even that notification was about a month-and-a-half after entry of the default. At that point, the insurer procured legal counsel for Defendant.[14]

At the hearing on Defendant's motion to set aside the default, defense counsel

---

[8] Defendant's motion to set aside default, 12/11/01. See also Tr I, 4.
[9] Affidavit of Mona Wilson, 11/30/01, ¶ 4, attached to Defendant's motion to set aside default, 12/11/01.
[10] *Id.*, ¶ 7.
[11] *Id.*, ¶ 5.
[12] Affidavit of Rosalee Barnes, 12/5/01, ¶¶ 9-10, attached to Defendant's motion to set aside default, 12/11/01.
[13] *Id.*, ¶ 4.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

represented to the trial court that "the fax transmission was sent and on the other end it was not received and couldn't be located."[15] Defense counsel indicated that these were "innocent circumstances" that constituted a reasonable excuse for failing to file an answer, and that the default should be set aside to allow "a fair, reasonable hearing on the merits" of the case.[16]

Plaintiff opposed the motion, arguing that there was no reasonable excuse for Defendant's failure to file a timely responsive pleading after being personally served with the summons and complaint.[17] The trial court granted Defendant's motion to set aside the default, reasoning that "there was a fax that went through or was sent that apparently didn't get through" and that this was "something out of the ordinary" that constituted a reasonable excuse for Defendant's failure to respond.[18] Plaintiff filed an interlocutory application for leave to appeal, which the Court of Appeals denied for failure to persuade the Court of the need for immediate appellate review.[19]

After the default was set aside, Defendant moved for summary disposition of Plaintiff's claim, alleging that the affidavit of merit was defective because Dr. Nearing was a specialist in endodontics and Defendant was a general dentist.[20] Plaintiff argued that trial counsel reasonably believed Dr. Nearing to be qualified as an expert under the

---

[14] *Id.*, ¶ 8.
[15] Tr I, 4.
[16] Tr I, 3-4.
[17] Tr I, 6-8. See also Brief in opposition to Defendant's motion to set aside default, 12/11/01.
[18] Tr I, 13. See also Order setting aside default, 1/2/02.
[19] *Saffian v Simmons*, order of the Court of Appeals, entered April 12, 2002 (Docket No. 239005).

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

statute and that the affidavit therefore complied with the statute. Plaintiff alternatively argued that, if the trial court dismissed the complaint, the dismissal should be without prejudice and with a tolling of the statute of limitations for the reason that an affidavit of merit was filed with the complaint, as opposed to a complaint filed with no affidavit of merit.[21] The trial court took the matter under advisement.[22]

While the matter was under advisement, Plaintiff filed a motion for default or other discovery sanctions, or to reconsider the ruling setting aside the previously entered default. Plaintiff argued that her repeated attempts to take the depositions of both Defendant and Mona Wilson were frustrated by defense counsel, culminating in the failure of those witnesses to appear for noticed depositions or to comply with subpoenas to produce the telephone records to verify any fax transmittal of the complaint.[23] The trial court ruled that the depositions would be taken on July 22, 2002, and that if Plaintiff discovered anything to give cause to reconsider the setting aside of the default, Plaintiff could file a motion within 14 days of the deposition.[24]

At Mona Wilson's deposition, she testified that on September 7, 2001, Defendant brought the complaint into her office.[25] Ms. Wilson testified that, twelve days later, she took a fax machine out of her closet, set it up, and faxed the summons and complaint to

---

[20] Motion for summary disposition, 3/14/02. See also Tr II, 3.
[21] Plaintiff's brief in opposition to Defendant's motion for summary disposition, 4/25/02. See also Tr II, 5-6.
[22] Tr II, 13.
[23] Brief in support of Plaintiff's motion for default or other discovery sanctions, 5/30/02.
[24] Tr III, 6.
[25] Deposition of Mona Wilson, 7/22/02, p 8 (the deposition was attached as an exhibit to Plaintiff's brief in support of Plaintiff's renewed motion to reconsider ruling setting aside

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

the insurer's Okemos office.[26] However, the phone records revealed no phone calls on September 19, 2001 to Okemos.[27] When confronted with those records, Ms. Wilson had no explanation, other than that the fax "must not have gone through."[28] She further testified that she never telephoned to confirm receipt and never discussed the matter with Defendant again.[29]

Because that information conflicted with the prior representations to the trial court that a fax had been sent and that the fax machine did not print a form indicating an error, Plaintiff filed a renewed motion to reinstate the default.[30] Plaintiff argued that the trial court's ruling setting aside the default was premised on the representations that the fax was sent by Defendant's employee to the insurer, but never received by the insurer.[31] Plaintiff argued that, since discovery revealed this not to be true, the default should be reinstated.[32] At the hearing on Plaintiff's motion, the trial court indicated some concern about the prior assertions to the court:

> Well, there's something new. I mean, if the good cause is that well, we faxed it, and they questioned that; and the phone records don't show a phone call was ever placed, it certainly reflects on the credibility of the assertion that indeed this fax was attempted or occurred.[33]

---

previously entered default, 7/30/02).

[26] *Id.*, pp 9-10.

[27] Phone records, attached as an exhibit to Plaintiff's brief in support of renewed motion to reconsider ruling setting aside previously entered default, 7/30/02.

[28] Wilson deposition, p 11.

[29] *Id.*, pp 11-12.

[30] Plaintiff's renewed motion to reconsider ruling setting aside previously entered default, 7/30/02.

[31] Tr IV, 3.

[32] *Id.*

[33] Tr IV, 3-4.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

Also at the hearing, Defendant raised a new argument, claiming that because the affidavit of merit was allegedly defective, it was insufficient to commence the lawsuit and Defendant never had any obligation to answer; thus, no default could properly be entered.[34] The trial court took the matter under advisement.[35]

On October 24, 2002, the trial court entered an opinion and order denying Defendant's motion for summary disposition and granting Plaintiff's motion to reinstate the default.[36] The court stated that Defendant's prior motion to set aside the default "was granted based on representations that the office manager for the Defendant had faxed the complaint to Defendant's insurance carrier on September 19 [and that] the fax never was received at the other end by the insurance carrier."[37] However, in light of the discovery of the phone records from that date, the court concluded that "it is questionable whether a good faith effort to transmit the summons and complaint by fax as alleged at the original motion to set aside the default is accurate."[38] Plus, when seeking to set aside the default, Defendant stressed the public policy in favor of litigating claims on their merits, yet now Defendant sought to dismiss Plaintiff's action without such any adjudication on the merits—a situation that the court determined to be "patently unfair."[39]

---

[34] Tr IV, 5.
[35] Tr IV, 11.
[36] Opinion and Order, 10/24/02.
[37] *Id.*, p 1.
[38] *Id.*, p 2.
[39] *Id.*, pp 2-3.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

Because this information was not known to the court at the time it set aside the default, the court found that it "was misled at the time of the initial ruling on this matter."[40] Thus, the court ruled that Plaintiff was "entitled to an order denying Defendant's Motion to Set Aside the Default."[41]

The court also addressed Defendant's assertion that it had no duty to file a responsive pleading. While finding that the affidavit of merit was "technically defective in that the doctor [that signed the affidavit] was not practicing in the field of general dentistry as is required by the statute,"[42] the trial court held that this did not relieve Defendant of the duty to file a responsive pleading. The court determined that the affidavit of merit was not grossly non-conforming, and that its attachment to the complaint triggered Defendant's duty to respond.[43] The court distinguished this case from a situation where no affidavit accompanied a complaint at all, in which case there would be no duty to respond.[44] Here, by contrast, an affidavit accompanied the complaint, which was executed by a medical professional who had substantial expertise in the treatment provided by Defendant, but was later found to be technically not qualified under the applicable statute.[45]

Under those circumstances, the court concluded that "[t]he defect of an untimely

---

[40] *Id.*, p 3.
[41] *Id.*
[42] *Id.*, pp 4-5.
[43] *Id.*, p 5.
[44] *Id.*, p 4.
[45] *Id.*, p 5.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

answer cannot be overlooked."[46] Thus, the court reinstated its previously entered default against Defendant.[47] The trial court also denied Defendant's motion for reconsideration.[48] The parties then stipulated to entry of a default judgment, which included the payment of case evaluation sanctions, and preserved Defendant's right to appeal from the court's decision reinstating the default.[49]

Defendant appealed as of right, and the Court of Appeals affirmed. The Court of Appeals held that Defendant was properly defaulted when he failed to file a timely responsive pleading to a properly served complaint and affidavit of merit, even where the affidavit of merit was later determined to be deficient because it was executed by an endodontist. The dissenting judge agreed with this legal proposition, issuing a separate opinion on other grounds.

Defendant now seeks leave to appeal to this Court. For the reasons set forth in this brief, this Court should deny leave. The Court of Appeals ruling is correct. A Defendant must file a timely responsive pleading when served with a complaint and an affidavit of merit.

Further facts will be discussed as necessary in the argument of the issue.

---

[46] *Id.*, p 5.
[47] *Id.*
[48] Tr V, 40.
[49] Default judgment, order for mediation sanctions, and final order/appeal preserved, 8/13/03.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

ARGUMENT

Defendant was personally served with a complaint and affidavit of merit, but failed to file a timely responsive pleading and was defaulted. In a motion to set aside the default, Defendant asserted that his office manager faxed the complaint to his insurer, but that the fax was not received. The trial court set aside the default, ruling that this constituted a reasonable excuse for failing to respond timely. However, discovery revealed that there had been no fax transmittal at all, so the trial court reinstated the default. The trial court did not abuse its discretion by reinstating the default.

Standard of Review: The trial court's decision whether to set aside a default is reviewed for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Also, the trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Discussion: The trial court did not abuse its discretion by reinstating the default, in light of all the facts revealed to the court. Defendant was personally served with the complaint, and he failed to file a timely responsive pleading. His asserted excuse for that failure to respond turned out to be inaccurate. Under those circumstances, the trial court was well within its discretion to reinstate the prior default status.

A. Even if Defendant's representations about the fax had been true, the trial court incorrectly set aside the default in the first place, so the court's decision to reinstate the default was proper.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

Initially, it should be noted that the trial court abused its discretion by setting aside the default at all. Even had Defendant's representations been true, they nevertheless did not constitute a reasonable excuse for failing to respond, so no good cause was shown to set aside the default.

A party may move to set aside a default or a default judgment under MCR 2.603(D)(1). Under that court rule, the motion "shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." *Id.*

There are two analytically distinct elements that must be shown to set aside a default: (1) good cause, and (2) meritorious defense. A party seeking to set aside the default must show both. *Alken-Ziegler*, *supra*, 461 Mich at 233. There are only two forms of "good cause": substantial procedural irregularity in obtaining the default, or reasonable excuse for failure to comply with the requirements that created the default. *Barclay v Crown Bldg & Development, Inc*, 241 Mich App 639, 653; 617 NW2d 373 (2000).

In this case, Defendant did not assert any substantial procedural irregularity. Thus, to show good cause to set aside the default, Defendant was required to provide a reasonable excuse for failing to file a responsive pleading. Defendant failed to make this showing. Defendant's stated excuse was that his office manager faxed the complaint to his insurer. The officer manager's affidavit stated that she personally faxed the complaint to the insurer. She also stated that the fax machine prints out a form only if there is a communication problem, and that no form was printed, indicating

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

that the communication went through. However, the insurance company had no record of ever receiving the fax. The trial court incorrectly held that this constituted a reasonable excuse for failing to respond to the complaint.

Defendant relied on *Kuikstra v Cheers Good Times Saloons, Inc*, 187 Mich App 699, 703; 468 NW2d 533 (1991), rev'd in part on other grounds 441 Mich 851 (1992). In that case, the defendant mailed the summons and complaint to its counsel, but counsel did not receive the mailed documents. The Court of Appeals held that the postal service's failure to deliver the mailed documents constituted a reasonable excuse for the failure to file an answer. Thus, a failed postal delivery can constitute reasonable cause. But see *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 550-552; 620 NW2d 646 (2001) (holding that, although misdelivery of mail might constitute good cause to set aside a default, it did not constitute good cause under the circumstances of that case, where the attorney should have kept abreast of case developments by other means).

However, in *Kuikstra*, the miscommunication arose out of the negligence of a third party—the postal service. In this case, even considering what was known to the trial court at the time of the motion (i.e., that Defendant's asserted fax transmittal was not yet called into question), Defendant's employee failed to verify that her fax transmittal was properly received. She also failed to mail a hard copy of the documents to Defendant's insurer. Moreover, Defendant's insurer was well aware of the pendency of this action, having been forwarded the notice of intent to file a claim. Defendant's

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

insurer never inquired of either Defendant or Plaintiff's counsel regarding the status of the case. Defendant never contacted his insurer to ask whether they were preparing a responsive pleading. Thus, in this case, any miscommunication was not the result of a third party's negligence, but of the actions of Defendant and his agents. "A party is responsible for any action or inaction by the party or the party's agent." *Alken-Ziegler*, *supra*, 461 Mich at 224. See also *Asmus v Barrett*, 30 Mich App 570, 574-575; 186 NW2d 819 (1971) ("[T]he negligence of an insurer can . . . be imputed to the insured. To hold otherwise would be to grant insurance companies an automatic right to vacation of all default judgments."). Therefore, *Kuikstra* does not support setting aside the default in this case.

Although counsel could discover no reported cases in Michigan addressing whether an attempted fax transmittal constitutes good cause to set aside a default, two cases from other jurisdictions provide some guidance.

The Georgia Court of Appeals has held that an alleged fax transmittal to an insurer does not constitute good cause to set aside a default where no responsive pleading was filed. In *Lee v Restaurant Management Services*, 232 Ga App 902; 503 SE2d 59 (1998), the defendant was served with the summons and complaint, but no answer was filed, and a default was entered. The defendant moved to set aside the default, providing an affidavit from one of the defendant's employees, who stated that she faxed the complaint to the defendant's insurer. *Id.*, 902-903. She did not, however, determine whether the fax transmittal reached its destination or whether an answer was

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

ever filed. *Id.*, 903. The trial court granted the motion to set aside the default, holding that the failure to answer was due to a reasonable mistake. *Id.* The plaintiff appealed, arguing that the trial court abused its discretion because the defendant was negligent in failing to ensure that an answer was filed. *Id.*, 904. The Georgia Court of Appeals agreed, holding that the asserted mistake was "simply insufficient to support setting aside an otherwise valid judgment at law." *Id.*

This conclusion was also reached in *Wayjohn, Inc v Abejon*, 724 So2d 1259 (Fla App, 1999). In that case, the defendant was served with the summons and complaint, and allegedly faxed them to its liability insurer. However, the insurer had no record of ever receiving the fax transmittal. No responsive pleading was filed, and the trial court entered a default against the defendant. Under these circumstances, the Florida Court of Appeals upheld the trial court's denial of the defendant's motion to set aside the default. *Id.*, 1260.

Both *Lee* and *Wayjohn* are strong persuasive authority in this case. They involve factual scenarios that are strikingly similar to the case at hand. In all three cases, the only action taken by the defendant was to fax the complaint and summons to its liability insurer. In all three cases, the defendant failed to confirm that the fax transmittal was received, and failed to diligently ensure that a responsive pleading was filed on its behalf. In all three cases, no responsive pleading was filed, and a default was entered. In both reported cases, the appellate court held that the alleged fax transmittal to the insurer was no excuse for failing to answer, and was not sufficient good cause to set

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

aside the default. However, the trial court in this case set aside the properly entered default.

This was an abuse of the court's discretion, and it provides an alternative basis on which to affirm the trial court's later reinstatement of the default.[50] The trial court effectively placed Plaintiff back in the position which Plaintiff should have been in all along. The default should never have been set aside in the first place, so reinstating it was not error.

B. Given that the reasons for setting aside the default were later found to be not valid, the trial court was within its discretion to reinstate the default.

After conducting discovery, it was learned that the phone records did not support the assertion that a long-distance fax was placed to Defendant's insurer. Defendant's office manager stated in her affidavit that she personally faxed the complaint to the insurer and that the fax machine did not print a report indicating any problem with the communication. There was no record of the insurer ever receiving this alleged fax. When Defendant's office manager was confronted with the phone records revealing that no call to the insurer was placed that day, she had no explanation. The trial court correctly noted that this new information "certainly reflects on the credibility of the

[50] Additionally, the fact that Plaintiff's interlocutory application for leave to appeal was denied does not foreclose analysis of this point, since the denial was not on the merits, but for failure to persuade the Court of the need for immediate (i.e., interlocutory) appellate review. See *Saffian v Simmons*, order of the Court of Appeals, entered April 12, 2002 (Docket No. 239005).

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

assertion that indeed this fax was attempted or occurred."[51] Indeed, the court ultimately found that "the Court was therefore misled at the time of the initial ruling on this matter."[52]

In light of this new information, Plaintiff moved for reconsideration of the court's prior ruling setting aside the default. The trial court granted that motion. This was within the court's discretion. When seeking to set aside the default, Defendant's only stated excuse for failing to respond to the complaint was the alleged fax transmittal. Had the trial court known at the time of Defendant's initial motion that this assertion was belied by the evidence, Defendant would have been left with no reasonable excuse at all for failing to respond. The trial court would not have set aside the default in the absence of any good cause to do so. Indeed, the trial court recognized this when it ruled that, in light of all the information, Plaintiff "is entitled to an order denying Defendant's Motion to Set Aside the Default."[53] In other words, had the court not been provided with inaccurate information, it would have denied Defendant's motion in the first place, and Plaintiff was entitled to be placed back in the position that it should have been in all along.

The trial court's ruling was well within the discretion afforded by MCR 2.119(F)(3), which allows the trial court to reconsider and correct rulings where a palpable error has misled the court. Although such motions must typically be filed within 14 days of the challenged ruling, the trial court enjoys the discretion to waive that

---

[51] Tr IV, 3-4.
[52] Opinion and Order, 10/24/02, p 3.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

requirement in order to correct a mistake. See MCR 2.108(E) (court may extend time for filing a motion); Dean & Longhofer, Michigan Court Rules Practice, 4th ed, § 2119.7, p 636 (noting that "the 14-day time limit on motions for reconsideration should not deter a trial court from revising its prior orders where legally appropriate"). Indeed, "[i]f a trial court wants to give a 'second chance' to a motion it has previously [ruled on], it has every right to do so." *Smith v Sinai Hospital*, 152 Mich App 716, 723; 394 NW2d 82 (1986). Here, the trial court gave a "second chance" to Plaintiff's opposition to Defendant's motion to set aside the default, in light of the newly discovered information, and corrected a mistaken ruling. This was entirely proper for the trial court to do, and this Court should affirm the trial court's reinstatement of the default.

C. *The fact that the affidavit of merit was later determined to be technically deficient did not retroactively absolve Defendant of the duty to file a timely responsive pleading, especially where Defendant never asserted a lack of duty to answer when seeking to set aside the default.*

Defendant argues that because the affidavit of merit was deficient, the action was void "ab initio" and that Defendant therefore had no duty to file an answer. According to Defendant, the trial court was thus powerless to default Defendant for failing to file a timely answer. However, both the trial court and the Court of Appeals correctly rejected this argument.

Defendant was personally served with the summons and complaint, as well as an affidavit of merit executed by Dr. Mark Nearing, DDS, specifying how Defendant

---

[53] *Id.*

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

breached the applicable standard of care. The general rule is that a defendant who is personally served with a summons and complaint must file an answer or other responsive pleading (i.e., a motion for summary disposition in lieu of an answer) within 21 days. MCR 2.108(A)(1); MCR 2.108(C)(1). Additionally, there is a specific court rule regarding malpractice actions:

> In an action alleging medical malpractice filed on or after October 1, 1986, unless the defendant has responded as provided in subrule (A)(1) or (2), the defendant must serve and file an answer within 21 days after being served with the notice of filing the security for costs or the affidavit in lieu of such security required by MCL 600.2912d; MSA 27A.2912d. [MCR 2.108(A)(6)].[54]

MCL 600.2912e(1) also provides that the defendant must file a responsive pleading "within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d."

Here, Plaintiff's complaint was personally served on Defendant, along with an affidavit of merit. Under MCR 2.108(A)(6), Defendant's duty to file a timely responsive pleading was triggered. After the 21 days elapsed and Defendant failed to respond, he was properly subject to a default.

When Defendant sought to have that default set aside, he did not challenge his duty to file a timely responsive pleading, but instead sought to provide an excuse for his failure to respond. Thus, Defendant effectively waived any claim that his failure to respond was excused by the lack of a duty to respond.

---

[54] MCL 600.2912d no longer allows a plaintiff to file security for costs, but instead now

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

In any event, Defendant's argument that he had no duty to respond to the complaint lacks merit. Defendant relies on *White v Busuito*, 230 Mich App 71; 583 NW2d 499 (1998); however, in that case, no affidavit of merit was filed at all. In *White*, the plaintiff filed a medical-practice complaint with no accompanying affidavit of merit. The defendant was defaulted for failing to file a timely responsive pleading, and the defendant later moved to set aside the default judgment, arguing that he never had a duty to respond. The Court of Appeals agreed, ruling that where no affidavit of merit is filed with the complaint, there is no duty to respond to the complaint. *Id.*, 77. The Court relied on MCR 2.108(A)(6) and MCL 600.2912e(1) in reaching this conclusion, because pursuant to that court rule and statute, the defendant's duty to file a responsive pleading is triggered when the defendant is served with the affidavit of merit. *Id.*, 76. Because the plaintiff had not filed any affidavit of merit at all, there was no duty to respond: "a plaintiff's filing of . . . an affidavit of meritorious claim is an absolute prerequisite to the defendant's obligation to answer or otherwise defend the action." *Id.* See also *Kowalski v Fiutowski*, 247 Mich App 156, 164; 635 NW2d 502 (2001) (holding that a defendant's answer filed without an affidavit of meritorious defense is incomplete and constitutes a failure to plead).

In this case, by contrast, Plaintiff **did** file an affidavit of merit with the complaint, both of which were personally served on Defendant. The fact that the affidavit was later found to be technically deficient does not negate this fact. Indeed, at the time of being served with the complaint and affidavit, Defendant did not know that the affidavit was

---

requires an affidavit of merit in all cases.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

defective. Where a defendant is served with a facially valid affidavit of merit along with the complaint, it would be a strange result indeed to say that the defendant has no duty to respond. The court rule and statute require the defendant to respond within 21 days of the filing of the affidavit.

Defendant spends much time arguing that Plaintiff's affidavit of merit was deficient. Plaintiff acknowledges that caselaw decided after the affidavit was filed does in fact render that affidavit technically deficient. See *Decker v Flood*, 248 Mich App 75, 83-84; 638 NW2d 163 (2001) (endodontist not qualified under MCL 600.2169 to render expert testimony against general dentist). However, that analysis misses the point. The trial court made a finding that the affidavit filed in this case could not be said to be grossly non-conforming; thus, it was facially valid, and Defendant had a duty to respond when served with the complaint and affidavit.

This conclusion is not undermined by *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003). In that case, this Court held that where an affidavit of merit was signed by a physician who lacked the defendant's board certification, the defendant was entitled to summary disposition, and the affidavit was insufficient to commence the action *for statute of limitations purposes*. *Id.*, 239-240. That is a different question than whether a duty to respond is triggered. The Court of Appeals correctly recognized this distinction, noting that "our Supreme Court has repeatedly instructed that cases decided in the context of tolling of the statutes of limitations are factually and legally distinguishable from cases that do not involve a statute of

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

limitations issue." *Saffian v Simmons*, ___ Mich App ___; ___ NW2d ___ (July 7, 2005), slip op at 4.

Defendant argues that the trial court should have granted its motion for summary disposition. However, even if Defendant may have been entitled to summary disposition if he had not defaulted, that question is moot. Under MCR 2.603(A)(3), a party may not continue to defend the action while that party is in default. *Accord, Michigan Bank-Midwest v D.J. Reynaert, Inc*, 165 Mich App 630, 648; 419 NW2d 439 (1988) ("Generally, a defaulted party may not proceed with the action until the default has been set aside."). Therefore, once the trial court reinstated the default, Defendant was not entitled to have its motion for summary disposition adjudicated, let alone granted—despite the merits of that motion.

Thus, the question in this case is not whether Plaintiff's affidavit of merit complied with every detail of the statute such that Defendant was entitled to summary disposition. **Rather, the question in this case is whether the trial court abused its discretion by reinstating the default, where the court later learned that the only reasons proffered for initially setting it aside were misleading.** Whether Plaintiff's affidavit of merit was later found to be technically deficient does not absolve Defendant of the duty to file a timely responsive pleading when personally served with a complaint and affidavit of merit. To hold that it does would strain the meaning of the statutes beyond their plain text and beyond common sense.

The Court of Appeals correctly recognized the problems that would arise if

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

defendants were not required to file timely answers to properly served complaints and affidavits of merit:

> To hold that a duty to answer the complaint never arose in this case would open the floodgates to all manner of retrospective claims that a defendant had no obligation to respond to a summons and complaint. Such reasoning would undermine the fundamental purpose of default and the finality of judgments. It rewards dilatory response to lawsuits in circumstances in which a lawsuit is by all initial accounts valid.
>
> Worse, to rule as defendant urges would create the opportunity for defendant to knowingly foster the running of the limitations period by ignoring a lawsuit and then simply bypass the default by attacking the affidavit of merit, depriving plaintiff of the legitimate opportunity to cure a defect if attacked in an answer and/or affirmative defenses. A defendant would suffer no adverse consequences if a post-default attack on the affidavit were successful. In the meantime, a plaintiff's claim is laid to rest as the limitation period expires. [*Saffian v Simmons*, ___ Mich App ___; ___ NW2d ___ (July 7, 2005), slip op at 5-6.]

Even the dissenting judge agreed with this basic legal conclusion. Judge Zahra opined as follows:

> I agree with the majority that defendant was required to answer or otherwise timely respond to the complaint, notwithstanding the defective affidavit of merit. Although the affidavit of merit was defective under MCL 600.2912d, defendant did not have the authority to unilaterally determine that the proffered affidavit of merit failed to comply with the requirements of MCL 600.2912d such that defendant was relieved of the duty to respond to the complaint. [*Saffian v Simmons*, ___ Mich App ___; ___ NW2d ___ (July 7, 2005), Zahra, J., dissenting, slip op at 1.]

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

Judge Zahra dissented on the question whether the factual record was sufficient to support the trial court's decision to reinstate the default due to the misrepresentations of Defendant when the default was initially set aside. But all the judges on the panel agreed that Defendant was required to file a timely responsive pleading.

Judge Zahra's separate opinion also provides useful analysis regarding how the Court of Appeals ruling is correct as a matter of statutory construction. MCL 600.2912e(1) provides that the defendant must file a responsive pleading "within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d." The phrase "in compliance with section 2912d" does "not authorize a defendant to unilaterally determine whether plaintiff's affidavit of merit satisfies the detailed requirements of MCL 600.2912d." *Saffian*, dissenting op at 2. "Rather, these phrases merely identify the type of affidavit that, if filed with the complaint, triggers defendant's obligation to answer or otherwise file a responsive pleading to the complaint." *Id.* In other words, since the statute requires an affidavit of merit, then such an affidavit must be filed with the complaint. The statute does not authorize a defendant to determine whether an answer should be filed.

The Court of Appeals correctly ruled that Defendant had a duty to file a timely responsive pleading. Defendant did not do so. Therefore, the trial court did not abuse its discretion by reinstating the default when the proffered reasons for setting aside the default were later revealed to be untrue. This Court should deny leave to appeal.

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

RELIEF REQUESTED

The trial court did not abuse its discretion in this case. Defendant was defaulted for failing to file a timely responsive pleading. When he sought to set the default aside, Defendant tendered an excuse for his failure that was misleading and inaccurate. When this was later revealed, the trial court reinstated the default, placing Plaintiff in the position she should have been in all along.

The Court of Appeals correctly ruled that Defendant had an obligation to file a timely responsive pleading when he was properly served with the complaint and affidavit of merit. This duty was not relieved simply because the affidavit of merit was later determined to be technically deficient.

Defendant has not presented sufficient grounds for this Court to review this case. Therefore, Plaintiff respectfully requests that this Honorable Court DENY Defendant's application for leave to appeal.

Dated: October 10, 2005

Respectfully submitted,

PATRICK & KWIATKOWSKI, PLLC
By: Aaron J. Gauthier (P60364)
Attorneys for Plaintiff/Appellee

P&K Law Firm

Patrick & Kwiatkowski,PLLC
520 N. Main St., #302
Cheboygan, MI 49721
(231) 627-7151

STATE OF MICHIGAN
IN THE SUPREME COURT

KIM SAFFIAN,

Plaintiff-Appellee,

v

Supreme Court No: 129263
Court of Appeals No: 250645
Lower Court No.: 01-006896-NH

ROBERT R. SIMMONS, DDS,

Defendant-Appellant,.

PATRICK & KWIATKOWSKI, PLLC
By: AARON J. GAUTHIER (P60364)
Attorneys for Plaintiff-Appellee
520 N. Main Street, Suite 302
Cheboygan, MI 49721
(231) 627-7151

BENSINGER, COTANT & MENKES, PC
By: Scott R. Eckhold P29365
Attorney for Defendant-Appellant
308 W. Main
PO Box 1000
Gaylord, MI 49734
(989) 732-7536

PROOF OF SERVICE

The undersigned certifies that on October 11, 2005, she filed Plaintiff/Appellee's Brief in Opposition to Application for Leave to Appeal and Proof of Service upon the Clerk of the Court, Michigan Supreme Court, Michigan Hall of Justice, 925 W. Ottawa Street, Lansing, MI 48915 (via UPS Overnight Delivery) and a copy upon Scott R. Eckhold, P.O. Box 1000, Gaylord, MI 49734 via US First Class Mail.

Debra James